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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1595

AMERICAN INTERNATIONAL UNDERWRITERS CORPORATION, AMERICAN INTERNATIONAL UNDERWRITERS MEDITERRANEAN, INC., MIDDLE EAST ASSURANCE AND REASSURANCE COMPANY, S.A.L., FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY AND AMERICAN LIFE INSURANCE COMPANY,

Petitioners,

vs.

FRANK WILLE, Superintendent of Banks of the State of New York, and United States of America,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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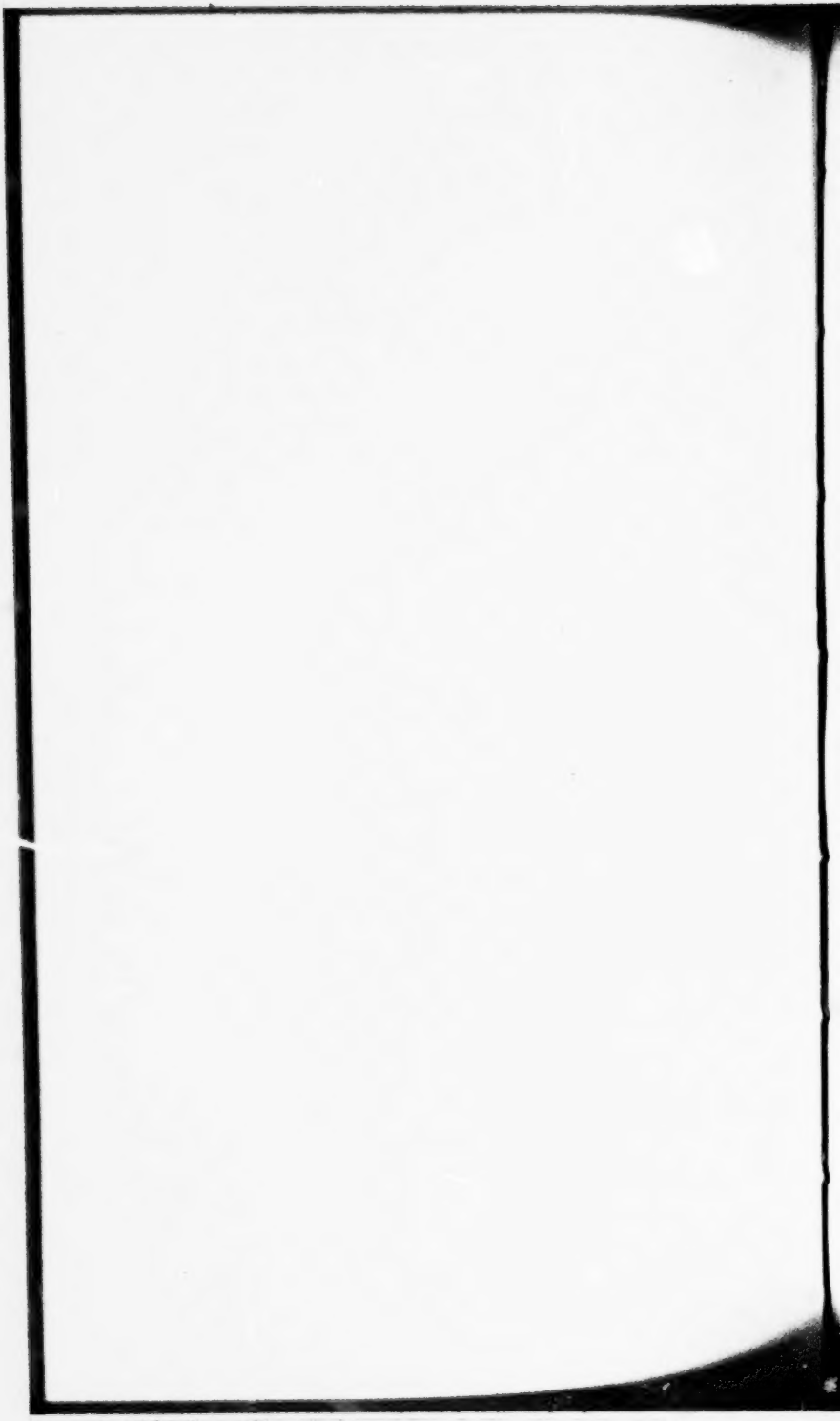

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners pray that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in the above entitled proceeding on October 30, 1969; a motion for reargument was denied on February 19, 1970.

Opinions Below

No opinions were written by the Court of Appeals of the State of New York or the Appellate Division, First Department. The decision of the Court of Appeals affirming, without opinion, the judgment of the Appellate Division is reported in 25 N.Y. 2d 619; the decision of the Court of Appeals denying reargument and amending its remittitur is not yet reported; the decision of the Appellate Division, First Department, affirming, without opinion, the orders of the Supreme Court of the State of New York, County of New York, is reported in 31 App. Div. 2d 721; the opinions of the Supreme Court of the State of New York, County of New York, are reported in 308 N.Y.S. 2d 520 (not officially reported).

Jurisdiction

The judgment of the Court of Appeals was entered on October 30, 1969 and a motion for reargument was denied by the Court of Appeals on February 19, 1970. A motion to amend the remittitur of the Court of Appeals to set forth the Constitutional question determined against the petitioners was granted by the Court of Appeals on February 19, 1970.

The material required to be appended to the petition under Rule 23 of this Court is printed in the appendix to the petition in this Court captioned, "INTRA BANK, S.A., Petitioner, vs. FRANK WILLE, Superintendent of Banks of the State of New York, and United States of America, Respondents," Docket No. 1584. The material is not reprinted here. Appendix references, therefore, are to the appendix to the petition of INTRA BANK, S.A. which arises from the

identical N. Y. case. The certified record in the New York courts was also filed with the Intra Bank petition.

The jurisdiction of this Court is involked under 28 U.S.C. §1257 (3).

Question Presented

Following the closing of the Beirut head office of Intra Bank, S.A., the Superintendent of Banks of the State of New York took over the assets of its New York branch (IBNY) and subsequently determined to liquidate the branch. After initially rejecting the claim of the Commodity Credit Corporation (CCC) the Superintendent reversed himself and entered into a compromise agreement with the CCC recognizing it as a New York creditor. The reason advanced by the Superintendent for the compromise was the possibility that the CCC might be entitled to a federal priority to all the IBNY assets under 31 U.S.C. §191. The net effect of the compromise is to grant a preference to CCC. dispose of all the assets of IBNY and deprive petitioners, who are attaching non-New York creditors, and other general creditors of an opportunity to share in the large surplus of assets in IBNY.

The New York Courts approved the compromise on the basis of hearsay affidavits and incomplete, inconclusive documentation over the objections of these petitioners and other parties, who sought discovery and an evidentiary hearing.

In these circumstances were petitioners deprived of due process of law under the Fifth and Fourteenth Amendments to the U.S. Constitution by the judicial confirmation of the compromise where:

a) the record before the New York Courts was incomcomplete and unreliable;

b) though incomplete, the record indicated (1) that the CCC has no federal priority because there was no debt due or certain to become due to the CCC and no evidence that Intra was insolvent and (2) its claim as a New York creditor is uncertain;

c) the petitioners were denied the opportunity to develop reliable evidence through discovery proceedings and a plenary evidentiary hearing.

Constitutional Provisions and Statutes Involved

Relevant constitutional and statutory provisions are set forth in Intra Bank Appendix B, pp. 55a-89a.

Statement

This review is sought from an order of the Supreme Court of the State of New York, County of New York, entered on June 24, 1968 [R. 16] granting the motion of the Superintendent of Banks of the State of New York (Superintendent) for approval of a compromise agreement with the CCC under which the previously rejected claim of the CCC was recognized as that of a preferred New York creditor of the New York branch of Intra Bank, S.A. (IBNY) and from an order on reargument entered on September 17, 1968 [R. 14], adhering to the original decision. The Appellate Division of the Supreme Court, First Department, affirmed the two orders of the lower court, without opinion, but granted leave to appeal to the Court of Appeals of the State of New York [R. 522, 526; 31 A.D. 2d 721]. The New York Court of Appeals affirmed the Appellate Division, without opinion, on October 30, 1969. On February 19, 1970 the New York Court of Appeals denied a motion for reargument but granted a motion to

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amend the remittitur of the Court of Appeals to read as follows:

> "Upon the appeal herein, there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether the rights of appellants under the Fifth and Fourteenth Amendments were denied. Appellants argued that the failure to hold a plenary hearing denied them due process of law. The Court of Appeals considered this contention and held that, on this record, the failure to order a plenary hearing did not deny due process of law to appellants."

Petitioners' demand for discovery proceedings and for an evidentiary hearing was raised in its answer to the petition in the lower court and on oral argument. Thus, the answer to the petition [R. 244-246] recites in part as follows:

. . .

> 6. The aforesaid Petition discloses no legal grounds upon which the Superintendent of Banks, even in the exercise of discretion, may recognize the claim of the Commodity Credit Corporation, particularly as a creditor against the New York branch of Intra Bank, S.A.
>
> 7. Respondents are attaching creditors of Intra Bank, S.A., at least, and are entitled to priority to assets of the New York branch of Intra Bank, S.A. in excess of that owed to New York creditors of Intra Bank.
>
> 8. Upon information and belief, the Superintendent of Banks of the State of New York has no standing to enter into a compromise of this nature, particularly since he has no evidence whatsoever that the claim of the Commodity Credit Corporation is valid, and if

valid, is entitled to recognition as that of a New York creditor under the Banking Law of the State of New York.

. . .

WHEREFORE, Respondents pray that the Petition be denied and that this counterclaim be granted to the extent that the Superintendent of Banks and the Commodity Credit Corporation be required to submit to disclosure, pursuant to Article 31 of the Civil Practice Laws and Rules, and to demonstrate therein the merits of the Commodity Credit Corporation's claim.

The affidavit of Peter J. Malloy, Jr. [R. 247-251], dated March 26, 1968, submitted in opposition to the Superintendent's petition, states in part as follows:

. . .

6. In his Petition the Superintendent of Banks asks this Court to approve compromise of the CCC claim without setting forth one iota of evidence that the claim of the CCC is valid. The Superintendent merely asserts that the claim arises ". . . from complicated international transactions involving—in addition to CCC, Intra Bank and Intra Bank New York—exporters in the United States, importers in Lebanon, brokers, middlemen, carriers, banks in Lebanon and in the United States, and others. Petitioner and the United States of America have differing views as to the characterization and legal ramifications of various aspects of these complex transactions. . . ." (Petition, paragraph 8) This is an incredible, if not insulting, basis upon which to ask this Court to act with respect to the proposed compromise.

. . .

9. Deponent is sure that many more questions will develop as the details of these "complicated international transactions" are divulged. This Court and the Respondents, whose claims will be wiped out by the proposed compromise, have the right to know the details of the CCC claim so as to evaluate the claim on the basis of fact, rather than conjecture.

WHEREFORE, deponent prays that the Petition be denied pending completion of disclosure proceedings to determine the details of the CCC claim.

A further request for discovery was made by counsel for the petitioners in oral argument before the lower court [R. 31]. These points were again raised in their briefs in the Appellate Division and the New York Court of Appeals.

(a) ***The Claim of Petitioners American International Underwriters Corporation, et al.***

These petitioners (Insurers) are United States corporations or are foreign corporations owned substantially by United States interests. All are in the insurance business and are creditors of Intra Bank, S.A., a Lebanese banking corporation. Their claims are primarily based on deposits with Intra Bank S.A. made in accordance with the statutes of various countries as a condition for doing an insurance business.

In mid-October, 1966 Intra Bank, S.A. (Intra Beirut) closed its doors and on October 15, 1966 the Superintendent took possession of its property in N.Y. State, which consisted mainly of the assets of IBNY and the 680 Fifth Avenue Corp. On October 26, 1968, pursuant to orders of attachment issued in actions commenced by three of the Insurers in Supreme Court, New York County, the Sheriff

levied upon IBNY and 680 Fifth Avenue Corp. Additional levies were made subsequently by the Sheriff pursuant to other orders of attachment in actions commenced by the two remaining Insurers. [R. 247] The Superintendent moved to vacate the levies of attachment, but in each case the attachments were upheld as valid as to the excess over amounts owing to those creditors of IBNY whose claims are preferred under §606(4)(a) of the New York Banking Law. [R. 252-6]

By reason of their attachments Insurers have established a priority right to the assets of Intra in New York in excess of the amounts owed to preferred New York creditors. They are most interested, therefore, in insuring that claims recognized by the Superintendent (1) are claims arising out of transactions with IBNY and entitled to preference under Banking Law §606(4)(a) and (2) are valid, enforceable claims. Insurers contend that on the record before the lower Court the subject claim of the CCC is neither entitled to preference nor valid.

(b) *Proceedings in the Lower Court.*

There was no testimony taken in the lower Court prior to approval of the Superintendent's proposed compromise agreement. The record consists entirely of affidavits and oral argument by attorneys having no personal knowledge of the complex transactions, supplemented by bare documentation, which clearly must be incomplete.

A special proceeding was commenced by order to show cause dated February 16, 1968, [R. 41] and verified petition of the Superintendent of the same date [R. 49] for approval of the subject compromise with the CCC.

The petition states that, after taking possession of Intra Bank on October 15, 1966, the Superintendent determined

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to liquidate its affairs.[1] On July 18, 1967 the CCC filed its claim with the Superintendent in the amount of $21,010,766, the principal amount of 53 letters of credit allegedly issued by IBNY. The sole details in the Petition of the CCC's claim are set forth in paragraph 8 thereof, which states in part:

> "The claim alleged by USA arises from complicated international transactions involving—in addition to CCC, Intra Bank and IBNY,—exporters in the United States, importers in Lebanon, brokers, middlemen, carriers, banks in Lebanon and in the United States, and others. Petitioner and USA have differing views as to the characterization and legal ramifications of various aspects of these complex transactions . . ."[2] [R. 50]

On August 9, 1967, according to the Petition, the Superintendent rejected the CCC claim.

On February 1, 1968, the Superintendent entered into an agreement of compromise with the CCC whereby the previous rejection of the CCC's claim against IBNY was to be withdrawn and the claim accepted subject to priority to be afforded all other IBNY creditors whose claims had been accepted by the Superintendent as preferred under §606(4)(a) of the New York Banking Law.

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[1] Since IBNY was at all times *solvent,* [R. 52-7; 93] and the home office, Intra Bank, S.A., was in the process of reorganization which culminated in the Beirut Agreement and Protocol of October 11, 1967, [R. 217] an initial question exists as to the propriety of the Superintendent's precipitous action in determining to liquidate IBNY. There is no proof that either IBNY or its parent were ever insolvent.

[2] Neither the Superintendent nor his Special Counsel ever advised the Court of the particulars of their differing view of the transactions. Only the view of the USA (CCC) was stressed.

By this compromise agreement the surplus over amounts owed to recognized IBNY preferred creditors is wiped out, since the CCC claim exceeds the amount of IBNY's remaining assets. [R. 59] The net result is to deprive other American creditors of Intra, *e.g.* the Insurers, of any possibility of obtaining satisfaction of any part of their claims in New York.

Aside from reducing administrative and litigation expenses, the Superintendent asserts in favor of the compromise that it compensates in full creditors of Intra recognized as preferred under §606 (4)(a) of the New York Banking Law whose claims might be dissipated if CCC were recognized, after litigation, as entitled to all IBNY assets pursuant to an asserted federal priority under 31 USC §191. The Superintendent also cites his reliance upon the opinion of his Special Counsel, Messrs. Hughes, Hubbard, Blair & Reed. However, at the hearing held on March 27, 1968 Francis Reed, Esq., a partner in this New York law firm, stated, enigmatically in view of his recommendations, but nevertheless emphatically:

> ". . . By offering this compromise, your Honor, the Superintendent does not surrender his position. *I still think we could win the case, if we tried it.*" [R. 33] (Emphasis added).

By verified answer sworn to on March 26, 1968 [R. 244] Insurers generally denied on information and belief the allegations of the Superintendent's Petition and counterclaimed under Article 78 CPLR alleging that the proposed compromise was an abuse of discretion and seeking, at least, the right to disclosure under Article 31 CPLR to ascertain the merits of the CCC claim. [R. 244]

On March 27, 1968 a hearing was held before Justice Hecht at which attorneys for the various parties engaged in oral argument. [R. 19-40] No testimony was taken. Numerous affidavits were submitted to the lower Court in support of or in opposition to the compromise, but none of the deponents indicated any personal knowledge of the involved transactions upon which the claim of the CCC was based. *Of particular note is the complete lack of any statement, sworn or unsworn, of an official of the CCC.*

(c) *The Claim of the CCC.*

The claim of CCC is based on amounts allegedly due under 53 letters of credit issued by IBNY in connection with the financing of commodity shipments to Lebanon, primarily grain. The letters of credit authorize the CCC to draw *for the account* of designated United States exporters. The drafts drawn upon the letters of credit, however, were required to be accompanied by a statement certifying that the amount due was not received within 36 months after delivery of the commodity. The letters further provide that the drafts would only be honored after a specified date to occur about 36 months after issuance of the letters of credit. [e.g. R. 257] None of the dates specified in the letters of credit had been reached on the date the Superintendent took possession of IBNY and the date specified in only one letter of credit, No. 184, in the sum of $113,286.44, had occurred prior to the last date for filing proofs of claim in the Superintendent's liquidation proceeding, July 20, 1967. A draft [R. 111] drawn by the CCC under letter No. 184 and dated March 23, 1967, was presented to the Superintendent and returned. [R. 113] The draft, however, was not accompanied by the certificate of non-payment required by the letter of credit.

None of the 53 letters of credit appeared, as even contingent liabilities, on the books of IBNY, which was subject to the jurisdiction of the New York State Department of Banking. [R. 89]

The transactions of which the 53 letters of credit were a part were exceedingly complex. The only detailed attempt at explanation of these transactions in the record below was made by Gary J. Strum, Esq., First Assistant Counsel of the New York State Banking Department, in his affidavits of April 17, 1968 and May 31, 1968. [R. 267 *et seq.*] At best, this was an effort to reconstruct events by an attorney without personal knowledge based on such records as were found at IBNY when the Superintendent took possession. Mr. Strum admitted that the records in his possession were incomplete, since they contained nothing with respect to dealings between CCC, Lebano-American Commodity & Supply Corp. (LACS) and the American exporters. [Par. 11, R. 275]

Based on the Strum affidavits and two documents submitted without further elaboration by the Assistant United States Attorney on June 14, 1968 [R. 434], the lower Court in its opinion [R. 493] described what it assumed to be a typical transaction:

1. An American exporter submitted an application to the CCC for credit in the required amount for shipment of a certain quantity of wheat to Lebanon for payment in 36 months, payment to be guaranteed by an irrevocable letter of credit issued by a qualified United States bank.[3]

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[3] In the sample credit application there is nothing to show compliance with the criteria set forth in the then existing CCC regulations GSM-3, Revision II, 7 C.F.R. §1488.3, for extension of credit beyond the normal six to twelve months to the maximum period allowed of 36 months. This is one indication that there was an overall agreement of some sort between CCC and Lebanese interests

2. The application was approved by the General Sales Manager for the CCC.

3. Lebano-American Commodity & Supply Corp. (LACS) instructed IBNY to designate the American exporter as the supplier of the commodities covered by letters of credit drawn in favor of IBNY by a Lebanese bank (never Intra Beirut) on behalf of a Lebanese miller and confirmed by United States banks.[4]

4. On or about the time of receipt of the LACS instructions IBNY received the irrevocable letters of credit from the United States banks covering the shipment. These letters of credit were of the usual commercial type. IBNY then wrote to the American exporter designating it as supplier and agreeing (a) to remit to the exporter its handling charges and freight; and (b) to establish a letter of credit in favor of CCC *for the account* of the exporter for the amount indicated, provided that the exporter submitted the documents required by the United States banks' letters of credit.

5. Upon receipt of documents from the American exporter IBNY transmitted them to the United States banks

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(LACS, *et al.*), not disclosed in the record below, which included a provision for extension of the maximum period of credit.

[4] In its opinion the Court below clearly erred in stating that IBNY received these orders from the Lebanese miller. [R. 494, par. 3] In each instance IBNY received instructions for designating the American exporter from LACS [R. 279, *e.g.*] which apparently acted as middleman and, in some way, as agent for the CCC in developing Lebanese markets for United States commodities and arranging credit terms and rebates for Lebanese importers. LACS is also shown as the purchaser of the commodity shipments in the American exporter's invoice [R. 295]. There is nothing in the record which establishes the relationship between CCC and LACS, a factor which is crucial in determining the validity of the CCC's claim.

and received in exchange credits from the United States banks in the full amount of their letters of credit. IBNY then disbursed to the exporter the amount due to it for freight and handling charges and credited the balance to the account of Intra Beirut.

6. IBNY then notified Intra Beirut of the credit to its account and received in reply authorization from Intra Beirut to establish its letter of credit in favor of CCC for the account of the American exporter.

7. Only after shipment of the goods, as shown by the shipping documents submitted by the exporter, and receipt of specific authorization from Intra Beirut, IBNY issued its letter of credit to the CCC in the form previously described.

8. Intra Beirut apparently deposited the credits received from IBNY from this transaction to the account of LACS in Intra Beirut. LACS, in turn, apparently used the credits in the account to generate profits which were used to finance rebates to the Lebanese millers and to compensate LACS and Intra Beirut for their services. This was concededly done with the knowledge and consent of CCC. [R. 470]

The logical explanation of these complex procedures is this:

The American exporter sold the commodities shipments to LACS, not the Lebanese millers who in turn purchased the shipments from LACS. The debts arising from the initial sales, therefore, were owed to the exporters by LACS and the IBNY guaranty letters of credit were opened on behalf of LACS. The funds received by IBNY through the United States banks from the Lebanese millers were the proceeds of the resales of the shipments by LACS

to the Lebanese millers and these funds belonged to LACS, which had 36 months within which to pay the American exporters with interest at 5%. The lower Court, however, presumed that these funds passing through IBNY represented the proceeds of the sales by the exporters and that neither the exporters nor CCC could look to the purchasers, which the Court mistakenly believed to be the Lebanese millers, since payment had already been made to IBNY. [R. 499] The purchaser from the American exporter in each case, however, was LACS. See excerpts from Cooper Bros. Audit, R. 325 and particularly par. 355, R. 326.

The record indicates that no attempt was ever made by the CCC or the exporter to recover from LACS, the primary debtor.

REASONS FOR GRANTING THE WRIT

I.

The Claim of the CCC Is Invalid as a Preferred Claim Under New York Banking Law §606(4)(a) and as a Priority Claim Under 31 USC §191.

Preference is accorded under the New York Banking Law in the subject liquidation proceeding only to those creditors whose claims arise out of transactions with the New York branch of a foreign banking corporation. Such claims are not preferred unless they would represent an enforceable legal obligation against the New York branch if such branch were a separate and independent legal entity. New York Banking Law § 606(4)(a). Claims of creditors other than those preferred under the statute are of no concern to the Superintendent. New York Banking Law § 606(4)(b).

The approval of the lower Court of the proposed compromise was based on a finding that the claim of the CCC was probably valid as a claim against IBNY in the liquidation proceeding and entitled to priority as a claim of the United States under 31 U.S.C. § 191 on two theories [R. 476]:

1. Restitution;

2. A mature cause of action under the 53 letters of credit.

Principal reliance was placed on the theory of restitution, which, as demonstrated below, is wholly inapplicable.

(a) ***There Was No Showing of Inequitable Conduct by IBNY or any Other Party to the Transaction and, Therefore, No Duty of Restitution.***

In its opinion on reargument the lower Court succinctly stated the major premise for its decision in favor of the compromise, a premise to which it devoted the greatest part of its original opinion:

> "The claim of CCC does not depend on its rights as holder of the letters of credit. It has a claim for restitution, based on the fact that Intra NY has procured money 'under such circumstances that in equity and good conscience [it] ought not to retain it' (*Pink* v. *Title Guar. & Trust Co.*, 274 N. Y. 167, 173), and which Intra NY 'is obliged by natural justice and equity to refund' (*Bayne* v. *United States*, 93 U. S. 642, 643). That debt becomes subject to CCC's statutory priority (see *Bayne*). CCC may sue directly on the debt without recourse to the letters of credit (*First Nat. Bank* v. *Mott Iron Works*, 258 U. S. 240, 241)." [R. 476]

The inequitable conduct of IBNY, according to the lower Court, was its failure to turn over the funds received from the Lebanese millers to the American exporter or the CCC. On analysis this conclusion is untenable.

The CCC extended credit to the American exporters for 36 months at 5% interest. This was in accordance with authority granted CCC to "(a) Support the prices of agricultural commodities through loans, purchases, payments, and other operations; . . . (d) Remove and dispose of or aid in the removal or disposition of surplus agricultural commodities; . . . (f) Export or cause to be exported, or aid in the development of foreign markets for, agricultural commodities; . . ." 15 U.S.C. § 714c.

In the conduct of its business the CCC was authorized to make necessary loans and advances of its funds. 15 U.S.C. § 714b (1).

The statute and Regulations issued by the Secretary of Agriculture contemplate that the American exporters would extend similar credit terms to foreign purchasers. For example, one of the criteria in the Regulations for approving credit periods up to the maximum of 36 months was to "(1) Permit United States exporters to meet credit terms offered by competitors from other Free World countries." 7 C.F.R. § 1488.3(c).

In the subject transactions the purchaser in each case was LACS, which received 36 months' credit from the exporter and agreed to pay interest at 5%. It was, therefore, on behalf of LACS that IBNY issued its guaranty letters of credit, subject to the conditions expressed therein, to CCC *for the account* of the American exporter. The funds which passed through IBNY were the proceeds of the resale of the commodities by LACS to Lebanese millers. These resales were distinct from the initial sale by the American exporter to LACS and the proceeds belonged to LACS. These proceeds were used by LACS to generate income with which to finance rebates to the Lebanese millers in accordance with the CCC objective of making the price of United States commodities competitive in Lebanon.[5] This was done with the knowledge and consent of the CCC and probably in accordance with an overall agreement between it and LACS which is not revealed in the record.

It is submitted that the lower Court's finding in favor of restitution was based on a misapprehension of the in-

[5] The lower Court's conclusion [R. 481] that only "a small fraction" of the proceeds were needed by LACS to finance the refunds is, of course, erroneous. LACS needed the entire amount to invest in order to generate sufficient income.

adequate record before it. As far as can be determined from that record, there was no inequitable conduct by IBNY and no duty of restitution.

(b) *There Was No Debt Due or Certain to Become Due to CCC Under the IBNY Letters of Credit.*

The IBNY letters of credit were issued as a guaranty and must be applied in accordance with their terms and conditions. The letters provided (1) that drafts drawn pursuant to the credit must be accompanied by a written statement of CCC that the amount due for the commodities was not received within 36 months of the delivery date and (2) that drafts would not be honored if presented earlier than 36 months after delivery. They also specified that the amount of the credit would be reduced by the amount of any credits or payments received by CCC for the account of the American exporter. [R. 277]

The 36 month period had not expired under any of the letters at the time the Superintendent took possession on October 15, 1966. Claims which are contingent on the date that the Superintendent takes possession of a bank are not entitled to share in the bank's assets. See, *e.g., Varick Spring Corp.* v. *The Bank of United States,* 264 N.Y. 297 (1934). October 15, 1966 is also the time of insolvency, if any, at which the existence of a debt to the United States must be determined under 31 U.S.C. §191.

Any obligation by IBNY under the letters could not mature until after October 15, 1966. Further, at any time after October 15, 1966 the claims of the CCC, as an arm of the United States, were subject to defeasance by payment for the account of the American exporter. The lower court, again erroneously, found to the contrary, reasoning:

"... Assuming, *arguendo,* that the claim of the letters of credit had not accelerated on the date of the liquida-

> tion order, and had therefore not matured at that time, there is no question but that they were indefeasible obligations which would have to be paid by Intra NY on the stated maturity date.
>
> As already pointed out, Intra NY was the sole obligor, since payment could not be claimed from either the Lebanese millers, who had already made payment, nor from ADM [the exporter], who had never received payment. Objectants emphasize the recital in the letters that CCC would consent 'to a reduction in the amount of this credit to the extent that CCC applies in satisfaction of the bank's obligation hereunder any payments or credits received for the account of [ADM].' But it is clear that CCC would not receive payments or credits from any other source, since such payments had already been made to Intra NY." [R. 509]

As noted above, LACS, the purchaser of the commodities, was the primary obligor, not the Lebanese millers. IBNY was required to pay, subject to the conditions of its letters of credit, only if LACS did not pay. Therefore, at the time the Superintendent took possession there was another party to whom the CCC and American exporter could look for payment and the claim was not certain to become payable by IBNY. Since the claim was " . . . wholly contingent for ultimate maturity and obligation upon the happening of events after insolvency . . ." they are not debts due at the time of insolvency under the priority statute, 31 U.S.C. §191. *Massachusetts* v. *United States*, 333 U.S. 611, 627 (1948); nor are they recognizable in the subject liquidation proceeding. *Varick Spring Corp., supra.*

(c) *In Any Case, the Claim of CCC Was Acquired From the American Exporter After the Alleged Insolvency and Is Not Entitled to Priority Under 31 U.S.C. §191.*

The debt arising from the sale of the commodities was owed by LACS to the American exporter, *not* to CCC. The IBNY letters of credit were, therefore, issued on behalf of LACS to guarantee LACS' repayment of the debt to the American exporter. Thus, the letters of credit specified that they guaranteed payment to CCC, not for CCC's own account, but *for the account of the American exporter.* There was no obligation running directly from IBNY to CCC.

The Regulations in effect during the subject transactions clearly demonstrate this conclusion. The exporter, under GSM-3 §1488.8 [R. 333], was required to repay its loan from the CCC in an amount equivalent to any early payments received by the exporter from the foreign importer on the debt arising from the sale. Section 1488.16 [R. 336] deals with assignment by the exporter of his claim against the importer. If the CCC rather than the American exporter held the claim, this provision would be meaningless. Therefore, any claim of the CCC is derived, by assignment or otherwise, from the American exporter upon non-payment by the purchaser at the expiration of the 36 month credit period. Such a transfer of debt to the CCC after insolvency cannot give rise to a priority under 31 U.S.C. §191. The CCC has no greater rights than the original creditor. *Engleman* v. *Commodity Credit Corp.*, 107 F. Supp. 930 (S.D. Cal., 1952); *United States* v. *Marxen*, 307 U.S. 200 (1939).

(d) *Subsequently, CCC Changed Its Regulations in an Attempt to Secure Its Priority Under 31 U.S.C. §191.*

Following the Intra affair CCC changed its Regulations. The amendments serve two purposes—(1) they add, for clarification, definitions of terms used in the old and new Regulations and (2) *they change the legal nature of the sales transactions so as to avoid the loss of federal priority under 31 U.S. §191 which occurred in the Intra case.*

Present GSM-4, §1488.2 adds the following definitions of "foreign importer" and "account receivable";

"(k) 'Foreign importer' or 'importer' means *the foreign buyer who purchases from the exporter* the commodities exported under a financing agreement and *who executes the instruments or other documents evidencing the account receivable assigned to CCC.*" (Emphasis added)

"(n) 'Account receivable' means the *contractual obligation of the foreign importer to the exporter for the portion of the port value of the commodity exported for which the exporter is extending credit to the importer.* The account receivable shall be evidenced by a promissory note or accepted draft in form and substance satisfactory to CCC, except that it may be evidenced by other documents, in form and substance satisfactory to CCC, evidencing the contractual obligation of the foreign importer when the account receivable is assured by an obligation issued by a U.S. bank or when the Vice President, CCC, or his designee, determines under special circumstances that it is in the interest of CCC. All such notes, accepted drafts and other documents evidencing the account receivable shall provide for (1) payment in U.S.

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dollars in the United States, (2) interest in accordance with §1488.6, and (3) acceleration of payment thereunder in accordance with the terms and conditions of GSM- (4). As used in GSM-4, 'instrument' means a promissory note or accepted draft."

These definitions confirm that the purchase price of the commodities is owed by the importer (here, LACS) to the American exporter and that it is the American exporter, not CCC, who extends credit to the importer.

Present §1488.9(a) lists the documents required to be submitted to the CCC within 45 days after export of the commodities. One of these documents is:

"(2) An assignment of the account receivable arising from the export sale, in form and substance acceptable to CCC. When the account receivable is evidenced by documents other than instruments, in accordance with §1488.2(n), such documents shall be submitted with the assignment."

This added provision completely changes the debtor-creditor relation arising from the sale since now, after assignment, the debt is owed to the CCC by the importer. There was no such requirement in the Regulations in force during the period of the subject sales to LACS. The purpose of the amendment is, of course, to make CCC the creditor so as to acquire a priority under 31 U.S.C. §191 in the event that the debtor later becomes insolvent. Such a priority did not arise in the subject transactions because at the time of any insolvency the debt ran to the American exporter who was not entitled to priority.

Subsection (7) of present §1488.9(a) also adds a requirement that accounts receivable become immediately due and

payable in the event of the importer's insolvency. There was no such provision in force at the times relevant to this case.[6]

The amended Regulations, in addition, drastically change the requirements for acceptable bank obligations (*i.e.*, letters of credit). Section 1488.9(a)(6) now requires the exporter to provide:

> "(6) A bank obligation or obligations in accordance with §1488.4, paragraphs (d) and (e) of this section, and §1488.11, payable to CCC, in form and substance acceptable to CCC, covering the financing agreement and including interest in accordance with §1488.6."

Paragraph (e) of §1488.9 reads:

> "(e) If for any reason a draft drawn under a foreign bank obligation is dishonored or if the issuing bank is insolvent, is in bankruptcy, receivership, or liquidation, has made an assignment for the benefit of creditors, or for any other reason discontinues or suspends payments to depositors or creditors or otherwise ceases to operate on an unrestricted basis, the obligation issued by that bank to CCC shall become immediately due and payable, and any balance due on the account receivable assured by the obligation issued by such bank shall, at the option of CCC, become immediately due and payable. CCC may permit the substitution of another acceptable foreign bank obligation covering such balance due and confirmed in accordance with §1488.4."

There was no provision for acceleration in the Regulations in force at the relevant times or in the 53 letters of credit.

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[6] There is no evidence in the present case that the importer-debtor, LACS, ever became insolvent.

Absent acceleration, the obligations of IBNY, which in any case ran to the exporter, remained contingent.

II.

In the case of *Protective Committee* v. *Anderson,* 390 US 414, 424 (1968) this Court set forth the due process standard of fairness required for a judicial confirmation of a compromise where the rights of those not party to the compromise agreement are involved:

> "... There can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated ..."

The lower court [R. 490] recognized this standard but did not comply with it. It is clear that the lower court and the New York Appellate Courts did not have before them all relevant facts—they merely had an incomplete record composed mainly of hearsay, speculation and a hodgepodge of documents unexplained by any party to the complex transactions with knowledge. This led the New York Courts to misinterpret the mechanics of the transactions, the relationships of the parties and the legal and equitable effects of their conduct.

Due process requires that petitioners and other creditors of Intra Bank be permitted to conduct discovery proceedings and to have an evidentiary hearing so as to develop the facts necessary for the court to make a reasonable appraisal of the compromise agreement.

CONCLUSION

The New York Courts were misled by the inadequate record and concluded, erroneously, that there was a substantial probability that the CCC could prevail in establishing a priority to the assets of IBNY in the event of litigation and that this justified the compromise agreement. Analysis of this record, however, shows that, on the contrary, it is unlikely that the CCC has a federal priority and that full disclosure of the facts will demonstrate that the CCC is in no better position than other general creditors of Intra Bank. To affirm the compromise on the present record without discovery and a plenary hearing will grant the CCC an inequitable disadvantage and deprive other creditors of Intra Bank of property without due process.

Dated: New York, N. Y.

Respectfully submitted,

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